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ABSTRACT

There are elderly Indians whose assets and property typically are not extensive enough to require or support the cost of a conservatorship. While a conservatorship intrudes on the authority of the elderly to manage their financial affairs, a guardianship removes an individual's most personal freedom of choice over movement and, therefore, it is important to maintain the distinction. While elderly Indians share many of the problems of elderly non-Indians with regard to guardianship, the possibility of unwanted guardianship in a legal forum which is not sensitive to the Indian culture can be truly disorienting for the individual. Tribal courts are clearly better suited to manage guardianship proceedings for elderly Indians because of the cultural insight and sensitivity the tribal judges and court personnel can bring to the determination. Under federal and state case law, tribal courts have exclusive jurisdiction over guardianship proceedings in non-Public Law 280 states. The Indian elderly have contributed tremendously to the preservation of Indian culture and history and, where guardianship is appropriate to provide needed care and protection, it should be managed with deep respect for persons to whom a great debt is owed. (ERB)

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GUARDIANSHIP FOR THE INDIAN ELDERLY

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The elderly Indian, down through the years, has been the preserver of the Indian race, Indian culture, Indian History. Indian people have never been ashamed of growing old.

The Indian elders have always been a part of the extended family. Being the heart and center of that Indian family, they bring into that family unit an experience, maturity. They also bring to us knowledge, wisdom.

Wendell Chino
From the opening remarks
at the National Indian
Conference on Aging
(June 1976)

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

John Stuart Mill
From On Liberty
(1859)

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Introduction*/

Elderly Indians are the living repositories of the traditions, customs and values of the Indian Nations. Because Indian history and values have often remained unrecorded, elderly Indians have carried the responsibility of passing on to younger generations the language, art and values of their Indian heritage. While this paper focuses on the issues and problems involved in guardianship for elderly Indians, it should be remembered that it is the Indian elder who has acted as the guardian of Indian culture. Any discussion of guardianship for elderly Indians involves, in a larger sense, the guardianship of the Indian heritage.

Elderly Indians share many of the problems of elderly non-Indians. In the matter of guardianship, many of the issues and problems are similar for both Indian and non-Indian elderly and this paper begins with a review of the nature of guardianship, the different types of guardianship, and a description of guardianship proceedings. Unwanted guardianship, involving the loss of personal and civil rights, is a problem for both Indian and non-Indian elderly but may be uniquely

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*/ The primary authors of this paper were John R. Keys, Jr. and Sheila A. Albin.

traumatic for the Indian elderly where the legal forum and potential institutionalization may be in culturally unfamiliar surroundings.

There are unique problems for elderly Indians involved in guardianship proceedings which arise, not from the fact of being older, but from the fact of being Indian. A central issue in any discussion of Indians and the law is the problem of jurisdiction. With regard to guardianship proceedings, the dispute is whether such proceedings should be conducted in state or tribal courts. This paper provides a summary of the law on civil jurisdiction over Indian affairs and supports the position that guardianship proceedings for elderly Indians should be handled by tribal courts.

Clearly, the improvement and development of the capacity of tribal courts and other non-legal mechanisms to assist elderly Indians are necessary. Remedies and resources that are the subject of legislation for older Americans and Indian children are, by analogy, useful and are discussed in this paper.

It is the purpose of this paper to recognize rather than resolve the issues in guardianship for Indian elderly. Guardianship is by its nature a very individual issue and the problems which it raises must be solved on a community level. To this extent, the discussion of

issues such as jurisdiction or the problems in tribal courts is necessarily general.

This paper is directed to persons generally concerned with the problems of elderly Indians and particularly concerned with legal problems which elderly Indians experience.

It is not the purpose of this paper to deny that elderly Indians may have need of guardianship in order to manage their personal or financial affairs. Guardianship, under appropriate circumstances and in a forum with procedures which safeguard the dignity of the individual, may provide for the Indian elderly well-deserved protection and care.

What Is Guardianship

The basic purpose of a guardianship is to assist persons who are unable to manage their personal and financial affairs in their own best interests and to protect them from themselves and from unscrupulous third parties.[1] The word guardianship describes the legal relationship that exists between a guardian and a ward. A guardian is defined as,

> a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status, or defect of age, understanding, or self-control, is considered incapable of administering his own affairs.[2]

A ward is "a person, especially an infant, placed by authority of law under the care of a guardian."[3]

1/ Horstman, Protective Services for the Elderly: The Limits of Parens Patriae, 40 Mo.L.Rev. 215 (1975). This article also appears in J. Weiss, Law of the Elderly (1977).

2/ Black's Law Dictionary 834 (rev. 4th ed. 1968).

3/ Id. at 1754-55.

With regard to the elderly, courts and writers have used various words and phrases other than guardianship including: conservatorship, committeeship, and protective services. A partial explanation for the diffusion of terms is the understandable sensitivity of the elderly towards the terminology used in this area of law and the association of guardianship with the care of minors.

Traditionally, a guardian is one charged with the protection and care of the person of an individual while a conservator is one charged with the protection and care of the property and estate of an individual. Guardianship is often used to include protection of both the person and the estate and, where this is intended, it is sometimes called a general guardianship in contrast to a personal guardianship which is limited to care of the person. A guardian ad litem is not truly a guardian in the sense discussed above but is a person who acts as the representative of an individual for the limited purpose of representing them in litigation.

A committee is a general legal term which describes any individual or body to whom a particular matter or obligation has been delegated for management, consideration, or determination.[4/]

The phrase protective services has developed in recent years and while it is typically used to describe a broad range of social services offered to assist the elderly, it has also been used to describe conservatorship and guardianship. The term is simply too broad and is a benign euphemism for legal proceedings in which an elderly person's most basic personal and civil rights are at stake.[5/]

Terms such as administrator or legal representative are sometimes employed instead of guardian but are not used here because they are too general and are more often associated with the administration of a decedent's estate. The term curator, which is used infrequently, means a person appointed to take care of anything for another person and is used interchangeably with guardian.

4/ Black's, supra n. 2 at 341-42.

5/ Horstman, supra n. 1, at 217.

For purposes of this paper, the traditional distinction between guardianship and conservatorship will be maintained for two reasons. First, the focus of this monograph is on elderly Indians whose assets and property typically are not extensive enough to require or support the cost of a conservatorship. Second, while a conservatorship intrudes on the authority of the elderly to manage their financial affairs, a guardianship removes an individual's most personal freedom of choice over movement and, therefore, it is important to maintain the distinction.

The Authority to Impose a Guardianship

The historical foundation of guardianship springs from the English concept of parens patriae.[6/] The term expresses the concept that developed in the 14th century that the King as father of the country had the responsibility to protect and care for persons who were incapable of doing so for themselves. On the basis of this authority, the King could take custody of the lands and property of disabled or incapacitated persons and was responsible for their maintenance and for the care of the individual. In American law, the concept has evolved to mean that the government, acting through its courts, has the responsibility and power to protect persons who are unable to care for themselves.

It is important to contrast the parens patriae power of the state with its police power. The police power of the state is its recognized authority to act in order to protect the health and safety of society and includes the authority to restrict or confine individuals who are dangerous or threaten society. This power is the source of society's authority to criminalize certain conduct and, because it often is involved in civil

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6/ Horstman, supra n. 1, at 218-19.

commitment proceedings, theoretically, distinguishes guardianship from civil commitment proceedings.

A person who is subjected to criminal proceedings under the state's police power is afforded strict procedural safeguards while a person who is the subject of guardianship proceedings is often afforded little due process. While many of the same basic civil rights, including the liberty of an individual, are at stake in a guardianship proceeding, an atmosphere of informality prevails because the parens patriae authority is exercised. Thus, a guardianship proceeding is characterized as nonadversary and presumably is conducted in the best interests of the individual.

Civil commitment proceedings often involve an exercise of the state's police power because, in addition to protecting a person from self-inflicted injury, these proceedings are also intended to protect society from dangerous individuals.7/ In recent years, courts have recognized that the rights at stake in civil commitment proceedings parallel those in criminal proceedings, and, thus, courts now require in civil commitment proceedings many of the requirements of due process that must be met

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7/ Kalcheim, Protecting the Aged Person - The Commitment Procedure, 10 Family L.Q. 161 (1976).

in criminal proceedings.[8/] As will be discussed below, the imposition of a guardianship may entail loss of freedom to establish one's own abode and, thus, the distinction between guardianship and commitment proceedings is, in some cases, obviously slight. Therefore, while imposition of a guardianship is under the parens patriae power of the state, the practical effect may be similar to a civil commitment although the guardianship may have been imposed without the procedural safeguards associated with the state's exercise of its police power.

8/ Jackson v. Indiana, 406 U.S. 715 (1972); Application of Gault, 387 U.S. 1 (1967); Sebastian v. United States, 531 F.2d 900 (8th Cir. 1976); Kendall v. True, 391 F. Supp. 413 (W.D.Ky. 1975).

The Guardianship Proceeding

Guardianship proceedings vary significantly among jurisdictions and depend upon the statutory requirements of each state.[9/] In addition, the procedural rules promulgated by individual courts affect the nature of the proceeding. The following description is offered as a basic model of traditional guardianship proceedings and will be compared with guardianship proceedings under the Uniform Probate Code.[10/]

Possibly the single most important question about guardianship proceedings for the elderly -- what finding must be made by the court in order to impose a guardianship -- is the most difficult to answer because of the great variance among the states and the typically vague statutory language employed. In addition, states rarely have specific statutory provisions for guardianship for the elderly and guardianship is often imposed under general incompetency statutes which may also cover minors and the mentally ill.

9/ G. Alexander & T. Lewin, The Aged and the Need for Surrogate Management (1972).

10/ Uniform Probate Code, Article V: Protection of Persons Under Disability and Their Property (hereinafter UPC). The National Conference of Commissioners on Uniform State Law develop uniform laws in various areas. The Conference works by committees of persons learned in a particular field and attempts to draft model laws.

The basic allegation in an incompetency proceeding is that the individual lacks the mental capacity to care for himself and his property. Statutes which distinguish between guardianship and conservatorship often do not require a finding of mental incompetence in order to impose a conservatorship while such a finding is required to impose a guardianship. The degree of proof and the type of evidence admitted on the issue of incompetence vary widely and courts tend to treat the question on a case-by-case basis. While a finding of actual mental illness is not necessary, something more than proof of a few incidents of unwise decisions is required.[11/]

A guardianship proceeding is generally initiated by filing a petition in court.[12/] Typically, the petition is filed by a family member or a person with whom the person alleged to be incompetent resides but many statutes permit any interested person to file the petition. The petition is filed in a court of general

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11/ An enlightening state-by-state statutory analysis appears in G. Alexander & T. Lewin, supra n. 9 at 32-58.

12/ National Council on Aging, Guardianship and Protective Services for Older People, Virginia Lehmann, Project Director, Geneva Mathiasen, Editor (1963), provides a summary description of traditional guardianship proceeding.

jurisdiction which has jurisdiction over the alleged incompetent. Depending on the organization of courts in a particular jurisdiction this may be a probate court, a family law court, or a trial level civil court. The case is then set for a hearing by the court.

A person alleged to be incompetent receives a copy of the petition and a notice or summons which informs him of the date of the hearing. This notice may not adequately inform him of the nature of the proceedings or of their consequences. Most importantly, such notices rarely inform an individual of his right to have an attorney present at the hearing.

The case is generally heard by a judge without a jury. Testimony by the petitioner and doctors is usually presented. The alleged incompetent may also testify and present witnesses if he wishes to contest the petition. While the majority of jurisdictions require the presence of the alleged incompetent at the hearing, courts are often permitted by statute to conduct the hearing without the presence of the alleged incompetent where his participation is precluded because of physical incapacity or there is a fear that participation at the

hearing would otherwise be traumatic. An affidavit by a doctor is usually sufficient proof of such an impediment.

The court issues a written determination as to the competency of the alleged ward and, if the court finds the alleged ward incompetent, appoints the guardian. The court issues letters of guardianship which provide proof of the guardian's authority to act on behalf of the ward. The guardian may be required to file a bond with the court and take an oath by which he swears to fulfill his duties faithfully.

A conservator charged with the management of a ward's property is typically required to file an inventory of all the ward's assets with the court and can be held to account for their proper management. The conservator is also required to give notice to all persons who may be involved in transactions with the ward or his property that all transactions henceforth are to be conducted with the conservator. The conservator generally has the authority to manage, invest and expend the incompetent's assets and is expected to exercise that

degree of care he would exercise in the management of his own affairs. The court traditionally has a continuing supervisory role and the conservator is typically required to file an annual account which reflects his management of the ward's assets.

The provisions of the Uniform Probate Code (UPC) on guardianship attempt to deal with some of the previously identified problems in traditional guardianship proceedings.[13/] The UPC distinguishes guardianship and conservatorship proceedings and provides more stringent procedural safeguards for guardianship in recognition that it is a greater infringement on an individual's personal freedom. It further distinguishes between guardianship for minors and for disabled persons, within which the elderly who require guardianship are classified.

13/ Effland, Caring for the Elderly Under the Uniform Probate Code, 17 Ariz.L.Rev. 373 (1975).

A significant difference between the UPC and many state statutes is that the UPC uses the terms disability and incapacitated person as the basis for imposing a guardianship rather than a finding of incompetence. An incapacitated person under the UPC,

> means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.14/

The change in terminology from a finding of incompetence to a finding of incapacity on the basis of advanced age is an effort to employ less offensive terms. Nevertheless, it should be recognized that the degree of proof necessary to establish incapacity due to advanced age may be less demanding than for incompetence.

14/ U.P.C. § 5-101.

The UPC provides procedural safeguards which are dramatically more exacting than many incompetency statutes, including: (1) a full judicial hearing before a judge;[15] (2) actual notice to the alleged ward, family members and any person who is acting as conservator or who is responsible for his care;[16] (3) appointment of an attorney or an official to represent the alleged ward if he does not have his own attorney;[17] (4) examination by a court appointed physician;[18] (5) a written report by a visitor who interviews the alleged ward and the petitioner and visits the present and proposed residence of the alleged ward;[19] (6) the right of the alleged ward to be present, have counsel present, present evidence and cross-examine;[20] (7) the right of the alleged ward or his counsel to request that the hearing be closed to the public;[21] and (8) an optional provision, adopted by

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15/ U.P.C. § 5-303 and 304.

16/ U.P.C. § 5-309.

17/ U.P.C. § 5-303(b).

18/ Id.

19/ Id.

20/ Id.

21/ Id.

some states, which grants the right to a jury trial.[22/] The UPC also outlines liberal procedures for removal of guardianship and the responsibilities of the guardian. These issues are often not treated by state guardianship statutes.

A guardian under the UPC, as under traditional guardianship law, exercises significant power and has the authority to establish the ward's place of abode within or without the state, may give consent to medical treatment, and, where no separate conservator is appointed, exercises substantial control over the ward's assets.

The imposition of guardianship over an elderly person, particularly where it is not desired by the ward, is clearly one of the most intrusive mechanisms for care of the elderly.

22/ Id.

> The adult who is found to be in need of guardianship is reduced to the status of a child in the eyes of the law. Although there are individual differences between the states, most statutes deprive the ward of the right to buy or sell property, to contract, to sue or be sued, to make gifts, to write checks, and generally to engage in financial transactions of any kind. The ward is also generally deprived of the right to vote, to marry, to operate a motor vehicle, and to consent to or refuse medical treatment.23/

In addition, the guardian may have the authority to establish the abode or residence of the ward and, coupled with his other powers, the guardian may have the ward voluntarily committed for care or treatment. Thus, the distinction between guardianship proceedings and civil commitment proceedings is often one of terminology.

23/ Horstman, supra n. 1, at 231.

Jurisdiction over Guardianship Matters for Elderly Indians

Guardianship is a civil matter. The basic issue examined in this section is the jurisdiction of tribal and state courts over guardianship for elderly Indians. The issue of jurisdiction over Indian affairs figures in any discussion of Indian history or law. Yet, it remains problematical particularly where the question involves the application of state law or the jurisdiction of state courts over Indians. While the following discussion is limited, some background on the basic jurisdictional questions in Indian law is necessary to understand the problem that is presented when guardianship proceedings for elderly Indians are brought in state court.[24/]

There are two established principles which are the starting point for a discussion of state juridiction. First, the United States Constitution gives the federal

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24/ Because guardianship is a civil matter, the law and problems with regard to the criminal jurisdiction of state and federal courts over Indians will not be considered in the following discussion.

government plenary power to legislate with regard to Indian affairs.[25] Second, Indian tribes, under the tribal sovereignty doctrine, enjoy the right to legislate for and govern tribal members living in Indian country as quasi-sovereign governments.[26] These two principles together restrict a state's assertion of jurisdiction over Indian matters in most cases.

> [A]bsent express Federal legislation, States do not have jurisdiction within Indian country. The reverse is true outside of Indian country: absent express Federal law to the contrary, Indians leaving Indian country have generally been subject to State law otherwise applicable to all citizens of the State.[27]

The trend in recent years has been to place greater reliance on the principle of federal preemption of state jurisdiction and to relegate the doctrine of tribal

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25/ "The Congress shall have Power . . . To regulate Commerce with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2.

26/ E.g., Worcester v. Georgia, 31 U.S. 515, 560 (1832).

27/ American Indian Policy Review Commission, Final Report, 94th Cong., 2d Sess., 114 (Comm. Print 1976).

sovereignty to that of "a backdrop against which the applicable treaties and federal statutes must be read."[28/] In brief, the states generally are precluded from asserting jurisdiction over Indians living on reservations or in Indian country where federal or tribal governments have preempted the states by assertion of their power. Even where the federal government has not directly demonstrated an interest in a particular area of civil authority, such as guardianship, a tribal government duly constituted under federal law, which has acted to make tribal law, may be held to be exercising powers delegated to it by Congress, thus, precluding state action in the same area.[29/] Moreover, the courts have recognized in the Indian tribes a basic right of self-government which may not be infringed by state exercise of jurisdiction.[30/] Thus, where the tribe is self-governing in a particular field the states will be preempted. Under these principles, state courts would

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28/ McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 172 (1973).

29/ Confederated Tribes of the Colville Indian Reservation v. State of Washington, 446 F.Supp. 1339, 1360-62 (E.D.Wash. 1978). At this writing the case is pending decision in the United States Supreme Court. No. 78-630.

30/ Id. at 1362-65; Williams v. Lee, 358 U.S. 217 (1959).

not have jurisdiction over guardianship matters for elderly Indians where the tribe can demonstrate that the exercise of such jurisdiction would infringe the tribal right of self-government.

Before discussion of case law dealing with the question of state civil jurisdiction, it is necessary to review the most significant federal statute granting state jurisdiction over Indian affairs.

Public Law 280

Public Law 280[31/] is a federal statute passed by Congress in 1953 by which the federal government extended the civil and criminal jurisdiction of five states[32/] to the Indian country within those states and provided for permissive transfer of jurisdiction for other states. By an amendment in 1968,[33/] Congress provided that assumption of state jurisdiction would require that Indian tribes, who would be subject to state jurisdiction, consent.[34/] In addition, it allowed the extension of jurisdiction over only some matters and not others and authorized states to return some or all of the jurisdiction assumed to the federal government.[35/]

31/ 18 U.S.C. § 1162 (1976) (criminal jurisdiction); 28 U.S.C. § 1360 (1976) (civil jurisdiction).

32/ California, Nebraska, Oregon, and Wisconsin; Alaska was added after achieving statehood.

33/ 25 U.S.C. §§ 1321-26 (1976).

34/ Id. A number of states assumed jurisdiction under Public Law 280 before the 1968 amendment which required tribal consent.

35/ Retrocession requires the consent of the Secretary of the Interior. 25 U.S.C. § 1323.

With regard to civil jurisdiction, Public Law 280 grants "jurisdiction over civil causes of action between Indians or to which Indians are parties"[36] arising in Indian country. State law of general application to private persons or private property is given "the same force and effect within . . . Indian country" as in the state.[37] The savings clause of Public Law 280 significantly restricts state jurisdiction over trust property.[38] While Public Law 280 provides that state courts are to give tribal customs and ordinances "full force and effect in the determination of civil causes of action," this requirement does not guarantee a culturally sensitive forum because tribal customs and ordinances must be consistent with state law in order to be applicable.[39]

Since its beginning, Public Law 280 has been controversial.[40] It was an attempt to compromise

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36/ 28 U.S.C. § 1360(a).

37/ Id.

38/ 28 U.S.C. § 1360(b).

39/ 28 U.S.C. § 1360(c).

40/ Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. L. Rev. 535 (1975).

tribal autonomy to some degree and to effectuate a measure of cultural assimilation. Like many legislative compromises, it has proved unsatisfactory to both the affected Indians and the states. The central impetus for the legislation was the alleged lawlessness existing on reservations and the lack of any tribal organizations for law enforcement or tribal judicial mechanisms. While the concern was clearly to transfer criminal jurisdiction to the state, "civil jurisdiction was an afterthought" and "comported with the pro-assimalationist drift of federal policy" at the time.41/

There is considerable variation among the states which have assumed jurisdiction pursuant to Public Law 280 as to the extent of jurisdiction.42/ Jurisdiction varies between reservations within one state and in regard to civil jurisdiction, may be restricted to only certain matters. State assumption of partial jurisdiction and the retrocession of jurisdiction, which has also been partial in some cases, has left a jurisdictional patchwork which requires an inquiry on not

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41/ Id. at 543.

42/ Task Force Four: Federal, State, and Tribal Jurisdiction, Report on Federal, State, and Tribal Jurisdiction, Final Report to the American Indian Policy Review Commission, 94th Cong., 2d Sess., 8-9 (Comm. Print 1976).

only a state-by-state basis but a reservation-by-reservation basis in order to establish the extent to which a state exercises jurisdiction in Indian country under Public Law 280. Nevertheless, where state courts have assumed full civil jurisdiction pursuant to Public Law 280, they may entertain guardianship proceedings for elderly Indians. In these circumstances, the only provision for cultural sensitivity on the part of the court is that portion of Public Law 280 which provides for the application of tribal customs and ordinances where consistent with state law.

While courts have recognized that tribal governments have exclusive jurisdiction over tribal members living on reservations unless a state has assumed jurisdiction pursuant to Public Law 280 or another federal statute, it is the position of some authorities that, under Public Law 280, the state and tribal courts have concurrent jurisdiction.[43/] Where jurisdiction is concurrent it can be argued strongly that tribal courts are clearly a better forum for resolution of such matters as guardianship and domestic relations.

43/ Matter of Duryea, 115 Ariz. 86, 563 P.2d 885, 887-88 (1977).

Case Law on Civil Jurisdiction

In White v. Califano,[44] the court held that the state of South Dakota was without jurisdiction "to initiate and carry out involuntary commitment procedures of a mentally ill Indian residing on a reservation."[45] The central issue in the case was whether the United States or the state of South Dakota was responsible for providing mental health care for Florence Red Dog, an indigent member of the Oglala Sioux Tribe. The court's decision that the United States was responsible for providing necessary care was based on its initial finding that South Dakota, under the infringement test of Williams v. Lee,[46] lacked jurisdiction over the matter.

44/ 581 F.2d 697 (8th Cir. 1978).

45/ Id. at 698.

46/ 358 U.S. 217 (1959); See discussion supra pages 22 and 23.

In the district court opinion,[47] which reasoning was adopted by the circuit court,[48] the court noted that commitment procedures involve "a loss of personal freedom analogous to that brought about through the application of the criminal law" and that involvement of the state would be a severe intrusion on tribal sovereignty.[49] Because guardianship often involves the authority to establish the abode of the ward or commit the ward to an institution for care or treatment,[50] state involvement in guardianship proceedings is clearly as intrusive upon tribal sovereignty as in the case of civil commitment proceedings. Thus, where a state has not assumed civil jurisdiction pursuant to Public Law 280,[51] a state should be held to have no jurisdiction in

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47/ 437 F.Supp. 543 (S.D. 1977).

48/ 581 F.2d at 698.

49/ 437 F.Supp. at 549.

50/ See discussion and accompanying footnotes supra pages 18 and 19.

51/ South Dakota has not assumed jurisdiction pursuant to Public Law 280. Discussion by district court in Appendix A, 437 F.Supp. 560-64. But see In Re Chubbee Estate, 326 P.2d 1057 (Okla. 1958), where, although Oklahoma has not assumed jurisdiction pursuant to Public Law 280, jurisdiction of county court inferred in a proceeding involving appointment of a guardian for an allegedly incompetent Indian.

guardianship matters for elderly Indians living on reservations or in Indian country.

Case law on civil jurisdiction disputes in the area of domestic relations involving marriage, divorce, adoption and child custody proceedings is particularly pertinent to the discussion of jurisdiction over guardianship proceedings for elderly Indians. The issues that are central in such proceedings invariably involve questions of Indian tradition and custom. These proceedings touch family structure directly and, thus, affect the fabric of Indian society. The following review of cases in this area demonstrates that courts have recognized the necessity that such matters be handled by culturally sensitive tribal courts and supports the contention that, in the absence of federal statute, guardianship proceedings for elderly Indians are within the sole jurisdiction of the tribal courts.

Whyte v. District Court[52/] involved a divorce action between two Indians, both duly enrolled at the Ute Mountain Reservation, where the marriage had been performed within the reservation. Colorado had not assumed jurisdiction pursuant to Public Law 280[53/] and the court held that the state court was without jurisdiction. Respondent attempted to distinguish prior case law on the basis that the Colorado state constitution did not contain a disclaimer of jurisdiction over Indian country. The court stated such an argument was irrelevant and the test of whether the court had jurisdiction in the divorce proceeding was whether Congress had authorized such jurisdiction within the state.

In another divorce action, Bad Horse v. Bad Horse,[54/] the opposite result was reached. In Bad Horse,

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52/ 140 Colo. 334, 346 P.2d 1012 (1959).

53/ See n. 29 supra and accompanying discussion.

54/ 163 Mont. 445, 517 P.2d 893 (1975). But see Red Fox v. Red Fox, 23 Or.App. 393, 542 P.2d 918 (1975), court held that tribal court has jurisdiction over domestic relations even where one spouse lives off reservation and marriage occurred off reservation.

a petition for divorce between two Indians, who were enrolled members at different reservations, was filed in a Montana court. The marriage took place outside the reservation and was performed under a valid state license. In addition, the Northern Cheyenne Tribal Code provided that Indian marriages and divorces were to be established in accordance with state law and that Public Law 280 provided for the assumption of civil jurisdiction.

The court relied heavily on an equal protection argument that Indians as citizens of the United States and Montana are entitled to have equal access to state courts.[55/] The court also noted that under the infringement test set forth in Williams v. Lee,[56/] the exercise of jurisdiction by the Montana court would not intrude upon the sovereign rights of reservation Indians.

55/ This argument was rejected in Fisher v. District Court, 424 U.S. 382 (1976). The Court stated that "[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe" and the "disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member." 424 U.S. at 390-91.

56/ 358 U.S. 217 (1959).

While the court observed that "[d]omestic relations may well be one of those concerns that are peculiar to Indian culture and tradition and best administered by tribal officials who understand Indian marriage and divorce customs,"[57] the court relied on the fact that the Northen Cheyenne had seen fit to cede this jurisdiction to the state and that the state had exercised such jurisdiction since 1937.

Cases dealing with adoption proceedings for Indian children raise the broad issue of the preservation of Indian culture which is similarly involved in guardianship for the elderly. Also, as noted previously,[58] where a guardian has been appointed for an elderly person, the status of the ward is similar to that of a minor and the paramount concern of the court in the well-being of the individual is similar to that involved in adoption proceedings.

57/ 517 P.2d at 896.

58/ See discussion at page 19.

In Fisher v. District Court,[59] the Supreme Court considered a jurisdictional dispute between the Tribal Court of the Northern Cheyenne Tribe and the Montana Supreme Court over adoption proceedings where all parties were members and residents of the Northern Cheyenne Reservation. The dispute arose as a result of adoption proceedings initiated in state court by a married couple who had been awarded only temporary custody by the tribal court. The state adoption proceedings were initiated when the tribal court ordered that the child be returned to his mother for temporary custody.[60] The Court held that "the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, [and] the jurisdiction of the Tribal Court is exclusive."[61]

59/ 424 U.S. 382 (1976).

60/ It appears from the decision that the tribal court, after first making the child a ward of the court in 1969 and denying the mother's petition to regain custody in 1973, was attempting in 1974 a trial reunion of the mother and child for six weeks and demonstrates an admirable flexibility on the part of the tribal court.

61/ 424 U.S. at 389.

In the area of adoption, courts have been sensitive to the necessity that consideration be given to the social and cultural issues underlying the jurisdictional question. While adoption proceedings are traditionally conducted in the best interests of the child, courts have recognized that, in addition to the interests of the child, there is a significant interest on the part of the tribe as a whole.

> If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity.62/

Moreover, the exercise of jurisdiction by tribal courts in such matters has been recognized as invaluable.

62/ Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 730 (W.D.Mich. 1973); see also, Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975).

> Often the tribal court's insight into tribal cultural values and way of life will make it the best forum for such a determination. Although we are not social scientists, as judges we must be aware of the fact that acts which mean one thing in our culture may have a very different meaning in another culture.63/

The need for such sensitiviy in the area of guardianship for elderly Indians is analogous. As noted previously,64/ elderly Indians act within the tribe as the source of much of the tribal customs and traditions and are the natural teachers for the young.

63/ Matter of Duryea, 563 P.2d at 888 (concurring opinion).

64/ See discussion supra at pages 1 to 3.

Tribal Courts[65/]

It is the position of the authors that, when feasible, guardianship matters should be handled by tribal courts, pursuant to acts of the tribal councils, because the tribal court presumably will be staffed by Indian personnel and will be a culturally sensitive forum for the affected elderly Indians. In addition, the involvement of tribal councils and courts in such matters is essential to self-government and, thus, important to all tribal members as a means of preserving tribal sovereignty and cultural integrity.

The development of tribal courts is the result of non-Indian influences. Although tribal courts attempt to incorporate tribal custom and tradition, a court system of administering justice is not a traditional Indian mechanism.[66/] While the use of tradition and

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65/ The following discussion of tribal courts is necessarily general as there are over 125 tribal courts in existence with great variance in terms of the jurisdiction which is exercised and the level of sophistication of the judicial machinery. For additional information and historical development of tribal courts, see sources cited infra at notes and 66 and 67.

66/ The National American Indian Court Judges Association, Indian Courts and the Future (1978).

custom typically plays a small part in tribal courts, it is more often employed in civil matters involving domestic relations. Generally, provisions of the tribal code are applied but, where an area is not covered, state law is applied. Certain traditions of tribal justice that have continued are particularly appropriate in guardianship proceedings. Traditionally, Indian judges exercise broad discretion; the informality of the proceedings and personal knowledge that the Indian judges typically have of the participants clearly is helpful in establishing what is in the best interests of an alleged ward in a guardianship proceeding.

Even though the previous discussion on jurisdiction makes clear that tribal courts have the capacity to exercise exclusive jurisdiction over guardianship in non-Public Law 280 states and, arguably, have concurrent jurisdiction in Public Law 280 states, there still remains the problem of whether the tribal courts have the ability to manage guardianship proceedings. In practice, the jurisdiction exercised by tribal courts is largely criminal.[67/] Civil cases typically are only ten to twenty percent of the caseload

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67/ The American Indian Lawyer Training Program, Indian Self-Determination and the Role of Tribal Courts (1977).

of the tribal courts and, in the civil area, domestic relations and juvenile cases predominate. The considerations and issues involved in guardianship for elderly Indians would not be unfamiliar to a court that has been involved in legal proceedings where questions of the best interest of minor children and family relations must be resolved. Thus, tribal courts which have exercised jurisdiction in these areas should be able to manage the proceedings and continuing supervisory role involved in guardianship matters.

The deficiencies of tribal courts in their ability to manage guardianship proceedings should be remedied by appropriate funding programs for personnel training and revision of tribal codes where necessary. Funds for such programs should be made available through the Bureau of Indian Affairs and the Law Enforcement Administration Agency which have funded judicial systems in the past. In addition, under the Older Americans Act, funding for programs associated with the problems of the elderly should also be made available.[68/]

68/ See n. 70 *infra* and accompanying discussion.

Tribal Mechanisms for Guardianship

The most important mechanism for controlling guardianship proceedings is the tribal court because a guardian can only be appointed after a judicial determination. While tribal courts presumably will be better able to assist elderly Indians involved in guardianship proceedings than state courts, there are several areas which the tribal courts and councils should review in order to make improvements. The two major areas are tribal code provisions and personnel training.

Tribal codes should provide for procedures to be followed when the question of guardianship arises. If the tribes are to preserve their jurisdiction over guardianship matters, it is important that they legislate in this area in order to preempt state action. A general guardianship provision should include: (1) who may file a petition; (2) what finding is required in order that a guardianship may be imposed; (3) a requirement that the alleged ward receive notice which informs him about the date of hearing, the right to counsel, the right to present evidence and cross examine; and (4) provision for an interview or examination by a court approved doctor or social welfare worker. In addition, the tribal code

should state what the responsibilities and authority of the guardian are and provide procedures for removal of the guardianship or replacement of a guardian who fails to fulfill his responsibilities. The tribal code could also provide that, in the event that a guardianship is required, priority should given to certain persons such as family members to serve as guardian.

Training for tribal judges and court personnel in the law of guardianship and the concerns of elderly Indians is clearly important for tribal courts unfamiliar with such proceedings. The tribal courts should be aware of treatment and care facilities available for elderly Indians in order that it may fulfill its supervisory responsibility and, in appropriate circumstances, recommend mechanisms less intrusive than guardianship.

A serious problem for some elderly Indians is that the younger members of their families have left the reservation and their friends may be of equally advanced age so that there are no relations or friends who can act as their guardian. As an alternative to having a person designated as a ward of the court, the tribal council could assume the responsibility to act as guardian for such persons. Another possibility is to create an office of Public Guardian to be filled by a person selected by

the tribal council who could act as guardian for more than one individual. The basis for selection of a Public Guardian and the responsibilities of such an office could be set forth in the tribal code.

As an adjunct to the office of Public Guardian, an ombudsman program for elderly Indians should be considered. An ombudsman, which term derives from the title used for this office in Sweden and Norway, is a person who receives and investigates complaints or grievances against a public official or agency, intercedes on behalf of the complainant and attempts to achieve settlements of the disputes.69/

Funding for ombudsman programs and legal services should be made available under the Older Americans Act.70/ That Act provides grants to state and local agencies for a wide range of social service programs for older persons. Under an amendment enacted in 1978, tribal organizations are eligible to receive grants directly from the Administration on Aging which administers the Older Americans Act. Proposed regulations for administration of grants for tribal

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69/ Handbook of American Aging Programs (L. Baumhover & J. Jones ed. 1977).

70/ 42 U.S.C. § 3001 et seq.

organizations were published in November 1979.[71] Actual operations will probably not be underway until late spring of 1980.

Ombudsman programs are flexible but are generally associated with problems experienced by persons in institutional health care facilities such as nursing homes or mental hospitals. Persons serving in an ombudsman program can act as a check on whether a guardian is fulfilling his responsibilities.[72] For example, where a guardian has failed to secure appropriate treatment or care or has failed to respond to the ward's complaints, the ombudsman could initiate removal of the guardian by contacting the court which appointed the guardian. In addition, ombudsman programs could be designed to assist the elderly, who do not require institutional care, to receive necessary social welfare services and, in appropriate circumstances, to avoid the necessity of a guardianship.

71/ 44 Fed. Reg. 70064-73 (1979).

72/ Handbook of American Aging Programs, supra n. 69 at 155.

Conclusion and Recommendations

While guardianship is intended to assist persons who are unable to care for themselves, in some circumstances, it presents significant problems. State statutory provisions on guardianship are often vague and do not provide sufficient procedural safeguards to protect the vital personal and civil rights at stake. Tribal codes may contain no provisions on guardianship which are pertinent to protection of the elderly.

While elderly Indians share many of the problems of elderly non-Indians with regard to guardianship, the possibility of unwanted guardianship in a legal forum which is not sensitive to the Indian culture can be truly disorienting for the individual. Tribal courts are clearly better suited to manage guardianship proceedings for elderly Indians because of the cultural insight and sensitivity the tribal judges and court personnel can bring to the determination.

Under federal and state case law, tribal courts have exclusive jurisdiction over guardianship proceedings in non-Public Law 280 states. Arguably, tribal courts have concurrent jurisdiciton in Public Law 280 states and, because of the nature of guardianship, tribal courts should be the preferred forum.

Federal legislation returning jurisdiction over guardianship for elderly Indians to tribal courts in Public Law 280 states should be considered. Recent legislation by Congress with regard to adoption proceedings and foster care for Indian children has had the effect of modifying Public Law 280.[73/] Because Congress was concerned with the high percentage of Indian children being removed from their families and placed in non-Indian foster and adoptive homes, Congress enacted several provisions which insure the involvement of tribal courts and councils in adoption proceedings for Indian children.[74/] The Secretary of the Interior is authorized

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73/ Indian Child Welfare Act, 25 U.S.C.A. § 1901 et seq.

74/ These provisions include: (1) a tribe's right to intervene in any state court child custody proceeding involving a minor member of that tribe; (2) the provision that every state and every Indian tribe give full faith and credit to all public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings; and (3) authorization of states and Indian tribes to enter into agreements with each other regarding custody of Indian children, transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between states and Indian tribes. In addition, any Indian tribe which became subject to state jurisdiction pursuant to Public Law 280, or any other federal law, may reassume jurisdiction over Indian child custody proceedings by presenting to the Secretary of Interior for approval a petition for partial or total retrocession which includes a suitable plan to exercise their reassumed jurisdiction. 25 U.S.C. §§ 1911 and 1931.

to make grants to carry out the purposes of the Act including grants for the education and training of tribal court personnel in skills relating to child and family assistance programs.

The ability of the tribal courts to manage guardianship proceedings should be improved through education and training of court personnel. Tribal codes should be revised to include appropriate procedural and substantive provisions on guardianship for the elderly. Adjunct programs, that could work with tribal courts and councils, such as a Public Guardian for indigent, elderly Indians without close relatives and ombudsman programs should be developed where necessary. Funding for such programs should be made available through the Administration on Aging and the Law Enforcement Administration Agency.

In guardianship matters for the Indian elderly, the two key words are caution and respect. Because the personal freedom of an individual is at stake, any court or community should impose its judgment of what is best for an individual with extreme deference and caution. The Indian elderly have contributed

tremendously to the preservation of Indian culture and history and, where guardianship is appropriate to provide needed care and protection, it should be managed with deep respect for persons to whom a great debt is owed.